

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
HERNANDEZ, et al, : 12-CV-04339 (ALC)  
:  
Plaintiffs. : October 15, 2013  
v. :  
: 500 Pearl Street  
THE FRESH DIET, INC., et al, : New York, New York  
:  
Defendants. :  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY HEARING  
BEFORE THE HONORABLE JAMES L. COTT  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: PETER J. ANDREWS, ESQ.  
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For the Defendants: JEFFREY A. MEYER, ESQ.  
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1 THE CLERK: Fresh Diet. Counsel, state your name for  
2 the record.

3 MR. ANDREWS: Peter Andrews from the Harman Firm for  
4 the plaintiffs. Good afternoon.

5 THE COURT: Good afternoon, Mr. Andrews.

6 MR. MEYER: Good afternoon, Your Honor. Jeff Meyer  
7 and Yale Pollack for the defendants.

8 THE COURT: Good afternoon, gentlemen. We're  
9 starting 15 minutes late, Mr. Andrews, because you were on the  
10 line. Is that what I hear?

11 MR. ANDREWS: That's correct, Your Honor. I was at  
12 500 Pearl Street at 2 o'clock but there's --

13 THE COURT: The line took 45 minutes?

14 MR. ANDREWS: It was a very long line, Your Honor.  
15 It was moving very slowly. Eventually they moved me to Worth  
16 Street.

17 THE COURT: Okay. So gentlemen, fact discovery is  
18 over. What are we doing next in this case?

19 MR. ANDREWS: Would you like to hear from me first,  
20 Your Honor?

21 THE COURT: You're the plaintiff's counsel, so yes, I  
22 would.

23 MR. ANDREWS: Yes, Your Honor. We would like to have  
24 a -- there's a scheduling order that's very old in this case.

25 THE COURT: Yes, I have it, docket number 33. I

1 looked at it today myself.

2 MR. ANDREWS: Okay. We would like to schedule -- we  
3 would like to reach a briefing schedule for any dispositive  
4 motions the defendants might wish to make.

5 THE COURT: Are defendants contemplating a summary  
6 judgment motion in this case?

7 MR. MEYER: We are, Your Honor.

8 THE COURT: You are? And what's the basis of it?

9 MR. MEYER: The basis is that they are -- the  
10 plaintiffs are independent contractors and represent themselves  
11 as independent contractors and treated themselves as  
12 independent contractors. Therefore, there's no overtime claim  
13 that would apply to employees.

14 THE COURT: And that's something that you think the  
15 Court can resolve on papers as opposed to a fact finder  
16 deciding it? There aren't going to be issues of fact?

17 MR. MEYER: Well, Your Honor, the issues of fact,  
18 there are -- we've concluded depositions in this matter.

19 THE COURT: Hallelujah.

20 MR. MEYER: Well, let me condition that with there  
21 are three plaintiff depositions that were noticed who have not  
22 been -- who have not appeared, who were not produced, who have  
23 not appeared.

24 THE COURT: All right. We'll come back to that.

25 MR. MEYER: Okay. A key element of our case, of our

1 summary judgment motion would be there is a case, eastern  
2 district case, Judge Spatt, Ceva Freight I believe it is, which  
3 addresses very similar issues of this case, almost directly on  
4 point factually. And there are a number of factors under which  
5 Judge Spatt held the plaintiffs to be independent contractors  
6 and dismissed -- granted defendant's summary judgment motion.

7 THE COURT: I think you cited that case to me  
8 somewhere along the way.

9 MR. MEYER: I think in our settlement conference we  
10 probably did. One of the key elements of that are the tax  
11 returns, the manner in which the plaintiffs represented their  
12 earnings as non-employee compensation under I think it's Table  
13 2 or Table C of their tax returns, and certain line items.  
14 We've demanded those documents not only in our initial  
15 discovery but in followup conversations with plaintiff counsel,  
16 as well as at their depositions. They have not been produced.  
17 Those --

18 THE COURT: How come you didn't write me a letter?

19 MR. MEYER: This occurred the end of last week  
20 towards --

21 THE COURT: It didn't occur at the end of last week  
22 if you included it in your document demands whenever you served  
23 that.

24 MR. MEYER: After the conclusion of the depositions  
25 we filed a supplemental document request just outlining all the

1 documents from the depositions that we requested and we were  
2 informed by plaintiff's counsel that even though it was served  
3 within the time of discovery that discovery had ended actually  
4 back on September 25<sup>th</sup>, which based upon the Court's order, I  
5 don't believe is true. And these were documents that came up  
6 during the course of each plaintiff's deposition which they did  
7 not object to previously during the document production, but  
8 only produced certain documents and not the tax returns, 1099  
9 forms.

10 THE COURT: It's never easy in this case, is it?

11 MR. MEYER: I'm sorry, Your Honor?

12 THE COURT: It's never easy in this case, is it?

13 MR. MEYER: We wish it could be.

14 THE COURT: I thought we were just going to talk  
15 about a summary judgment motion and now you're telling me  
16 there's all this residual discovery still to be resolved.

17 MR. MEYER: The very number, a finite number of  
18 documents which --

19 THE COURT: And discovery was closed last week and it  
20 was reopened essentially, or extended further for a limited  
21 purpose, not so that you could be making post fact discovery  
22 motions to compel which is what it sounds like you're talking  
23 about now. Where have you been with respect to these tax  
24 returns if you've contemplated this motion which I know you  
25 have for months now?

1           MR. MEYER: We requested them originally. Every time  
2 we spoke with plaintiff's counsel, we'd ask for them. We asked  
3 for them again at the depositions when the issue came up.  
4 There was no objection made to their production. We further  
5 demanded their production at each individual's deposition.  
6 Some said they didn't have them, which is fine. But for those  
7 that do, we've requested their production again. There was no  
8 objection at the depositions.

9           THE COURT: All right. Is there now an objection?

10          MR. ANDREWS: Yes, there is an objection, Your Honor.  
11 As Mr. Meyer said, first of all, many of our clients do not  
12 have tax returns.

13          THE COURT: Can't produce something you don't have.  
14 He understands that. What about the ones who have them?

15          MR. ANDREWS: For the ones that may have them, we do  
16 not think they are relevant to the issue of Mr. Meyer's  
17 contemplated summary --

18          THE COURT: Did Judge Spatt make reference in his  
19 written decision to tax returns of plaintiffs in his case?

20          MR. MEYER: Very specifically, almost as a  
21 dispositive issue in that case.

22          THE COURT: How are you going to get past that?

23          MR. ANDREWS: How am I going to get past that?

24          THE COURT: Yes.

25          MR. ANDREWS: Your Honor, if the Court so orders, we

1 will consult with our clients again. Our clients have advised  
2 us in many instances that they do not have these returns.

3 THE COURT: Well, hold on.

4 MR. ANDREWS: Yes, Your Honor.

5 THE COURT: Let's be clear.

6 MR. ANDREWS: Yes.

7 THE COURT: If your clients don't have tax returns,  
8 they can't produce them.

9 MR. ANDREWS: That's correct.

10 THE COURT: And Mr. Meyer understands that. If your  
11 clients have tax returns, unless you can cite me some legal  
12 authority to suggest you shouldn't produce them, Mr. Meyer has  
13 articulated to me that at least the critical case from his  
14 standpoint that he's going to largely rely on in fact cites to  
15 the tax returns of the employees as a basis for that court  
16 finding that they were independent contractors and not  
17 employees, and therefore not subject to the provisions of the  
18 law that's applicable here. It sounds to me like you're going  
19 to have a hard road ahead of you, but I'm not going to pre-  
20 judge it if you have legal authority, which I hope you would if  
21 you are not producing it on some legal grounds. That's all.  
22 You're not being required to produce anything you don't have.  
23 But if your clients have tax returns in their possession -- and  
24 as far as I'm concerned, and I assume Mr. Meyer probably  
25 wouldn't object to this, they could be redacted at least in

1 part if that was a concern. You don't need their whole tax  
2 return.

3 MR. MEYER: There is specific information in the tax  
4 return that we would deem critical to our motion.

5 THE COURT: Right.

6 MR. MEYER: Granted, not all of it, yes.

7 THE COURT: Right.

8 MR. MEYER: We would have to --

9 THE COURT: You don't need their, you know, Schedule  
10 Ds or whatever.

11 MR. MEYER: Your Honor, we would be more than willing  
12 to work with plaintiff's counsel on a proper confidentiality  
13 order or a redaction checklist to work that out, as long as the  
14 information that we deem critical, as cited by Judge Spatt, is  
15 present.

16 THE COURT: So I think, Mr. Andrews, what I would  
17 suggest is you have a meet and confer on this very specifically  
18 that Mr. Meyer will identify to you the specific aspects of the  
19 returns of your clients who do in fact have tax returns that he  
20 wants. And unless you have some legal authority that you will  
21 cite to him and eventually probably have to cite to me, I  
22 suggest you work it out without further court intervention  
23 because it sounds to me like it's going to be germane to the  
24 motion that needs to be made. Okay?

25 MR. ANDREWS: We will certainly meet and confer



1 promptly with defense counsel.

2 THE COURT: Okay.

3 MR. MEYER: I guess just to follow up with that, Your  
4 Honor, we'd be more than willing to also entertain a briefing  
5 schedule. We can work with plaintiff's counsel on that. What  
6 we would propose, and if obviously plaintiffs were amenable to  
7 that, would be now that we're down to a finite number of  
8 plaintiffs again, possibly with the dismissal of three of the  
9 claims for people who didn't appear for depositions, to have a  
10 second go around with the settlement conference prior to the  
11 actual motions in order to cut down on costs and fees across  
12 the board.

13 THE COURT: Well, let's take this one step at a time.  
14 First of all, the summary judgment motion in the case is going  
15 to be before Judge Carter --

16 MR. MEYER: Right.

17 THE COURT: -- because it's a dispositive motion.  
18 Number two, Judge Carter has a pre-motion conference  
19 requirement, so any schedule for the motion is one that I  
20 assume he will set after you see him for a pre-motion  
21 conference.

22 MR. MEYER: Fair enough.

23 THE COURT: So it seems to me you should sort out  
24 this tax return issue. Once you've done that, write him a  
25 letter and say you want a pre-motion conference to schedule the

1 summary judgment motion you're contemplating. And then if you  
2 want to, but it takes two to tango and we've already done this  
3 once, so I don't want to do it unless the parties are really  
4 interested, you know, you could schedule potentially a  
5 settlement conference in that window between when you have your  
6 pre-motion conference with Judge Carter and when you schedule  
7 briefing itself. So you know, if you see him November 1<sup>st</sup> and  
8 you schedule your opening brief for December 1<sup>st</sup>, you see me  
9 sometime in November, like that, if you wanted to do it that  
10 way.

11 MR. MEYER: We'd be amenable to that.

12 THE COURT: Okay. Mr. Andrews, your clients, many of  
13 them came the last time and I met with them and they seem as a  
14 group singularly uninterested in settlement. And certainly, if  
15 they're not interested, that's their absolute right, and we're  
16 certainly not going to reconvene if it's an exercise in  
17 futility or an academic exercise. So do you have any further  
18 thought about whether your clients, given the current posture  
19 of the case in which discovery is now over, no class was  
20 certified and a summary judgment is in the offing on  
21 independent contractor grounds where in theory anyway if Judge  
22 Carter granted the motion the case would be over and they would  
23 walk away with nothing, your clients would want to have another  
24 settlement conference? Or is it something you think they're  
25 not interested in doing?

1           MR. ANDREWS: I think they may be interested in doing  
2 it. I would have to consult with them. I would not want to  
3 schedule another repeat of what we had the last time where we  
4 spent hours and hours here. People took time off from work and  
5 unfortunately very little was accomplished. I think that's  
6 something I would have to discuss with my clients before  
7 committing to a settlement conference.

8           THE COURT: That's fine. That's totally fair. I  
9 would expect you to want to do that. But let's set some time  
10 lines here so that we can figure out what's going to go on. So  
11 I want you all to have a meet and confer by Friday on this tax  
12 issue and get it resolved. Assuming you get it resolved by  
13 Friday, then Mr. Andrews, I want you to make whatever  
14 production there is to be made with respect to the returns  
15 within ten days thereafter.

16           MR. ANDREWS: Yes, Your Honor.

17           THE COURT: Okay? So I'll put some dates on that.

18           MR. MEYER: Your Honor, if I could just add to that,  
19 and we'll do this as part of the meet and confer, there were a  
20 handful, literally a handful of documents raised during the  
21 depositions over the last couple of weeks.

22           THE COURT: Okay. So enfold that into your meet and  
23 confer.

24           MR. MEYER: We'll address all those issues.

25           THE COURT: So I want you to have a meet and confer

1 by the 18<sup>th</sup> and with respect to these outstanding discovery  
2 requests, document requests, and in particular the tax returns.  
3 But if there are other stragglers, then you can feel free to  
4 raise those as well. I'm going to assume you're going to work  
5 that out. If you don't work it out for some reason and you  
6 need my intervention, then write me a letter no longer than two  
7 pages. Okay? And send it to me the following week and I'll  
8 try, although I am, to be candid with you, swamped at the  
9 moment, I will try my best to issue a short order either  
10 granting it or denying it as the case may be so that that will  
11 be clear as to where we stand on that. And let me just, you  
12 know, double back to say, Mr. Andrews, that what I'm expecting  
13 in the meet and confer is that the parties are going to work  
14 out some redaction of tax returns so that your clients don't  
15 feel like they're, you know, sharing their entire financial  
16 life story with the defendants, but that the defendants are  
17 interested in very specific information that they think will  
18 enhance their ability to make this motion. That's what I  
19 contemplate the parties working out. And it doesn't sound to  
20 me like Mr. Meyer is trying overreach, if you will.

21 All right. So I'm going to assume that you've had a  
22 meet and confer by the 18<sup>th</sup> and I'm going to assume that you've  
23 worked it all out and that production has occurred let's say by  
24 the end of October. Okay? October 31<sup>st</sup> I'll expect any further  
25 and final document production, redacted tax returns, and any

1 other stragglers to be made.

2           Now, I assume also in that intervening period between  
3 now and the 31<sup>st</sup> you're going to write Judge Carter a letter in  
4 which you're going to seek a pre-motion conference and that  
5 he's going to see you sometime in the early part of November.  
6 And then what I would suggest you do is that you build into the  
7 schedule that you're going to propose to him a window for  
8 settlement of sometime let's say between the 15<sup>th</sup> and 30<sup>th</sup> of  
9 November, keeping in mind that the 28<sup>th</sup> is Thanksgiving. So it  
10 probably realistically wouldn't be the week of the 25<sup>th</sup>. We'd  
11 either fit you in the week of the 18<sup>th</sup> if we could, or perhaps  
12 the week of the 2<sup>nd</sup> of December. That's I think realistically,  
13 given Mr. Andrews would have to mobilize his plaintiffs again,  
14 assuming that they wanted to come as a group again. And so you  
15 can plan on that. As I remember the last time we had a  
16 settlement conference, we did it on all of five days notice, so  
17 hopefully we can do it on a longer period of time than that.

18           But if there's going to be a settlement conference, I  
19 assume it would be either the week of the 18<sup>th</sup> of November, or  
20 the week of the 2<sup>nd</sup> of December. And you can be in touch with  
21 my chambers once you've worked on some mutually convenient  
22 dates. And then you'll otherwise proceed with summary judgment  
23 before Judge Carter either without a settlement conference if  
24 Mr. Andrews' clients are not interested in coming back, or if  
25 we have a settlement conference and the case doesn't settle,

1 then you'll otherwise have a schedule in place with Judge  
2 Carter and you'll go forward and litigate. That make sense?

3 MR. MEYER: Very good.

4 MR. ANDREWS: Yes, Your Honor.

5 THE COURT: Okay. So anything else that you want to  
6 attend to today? I know, Mr. Meyer, you said there were three  
7 plaintiffs who weren't produced for deposition or didn't show  
8 up?

9 MR. MEYER: That's correct. Mr. Perez, Delarosa, and  
10 Brian White.

11 THE COURT: What's the story with them, Mr. Andrews?

12 MR. ANDREWS: Your Honor, the story is a very simple  
13 one. The first time the defendants in this case noticed  
14 depositions was on August 28<sup>th</sup>. On August 28<sup>th</sup> they issued ten  
15 notices of deposition. I've been scrambling since that time to  
16 produce as many witnesses as possible. I have produced seven.  
17 With respect to the other three, two of them are non-English  
18 speaking persons. One of them, Mr. Delarosa, is available to  
19 be deposed. We know that discovery has ended. Mr. White is  
20 disabled and is available to be deposed telephonically. And  
21 Mr. Perez, unfortunately our office has not been able to  
22 establish regular contact with. So that's the story with  
23 respect to those people.

24 So to give a short answer, between August 28<sup>th</sup> and  
25 today we've been trying to produce as many --

1 THE COURT: Let's say this. Between now and the 31<sup>st</sup>  
2 of October you should make Mr. -- was it Delarosa?

3 MR. ANDREWS: Delarosa.

4 THE COURT: Available in person.

5 MR. ANDREWS: Yes.

6 THE COURT: And you should make Mr. White available  
7 either for a telephonic deposition or Skype deposition, however  
8 you want to proceed. And as to Mr. Perez, you all will take  
9 whatever action you need to. Either he's going to get  
10 dismissed if you're not in contact with him or otherwise. But  
11 since there are multiple plaintiffs here, I don't think we need  
12 to worry about one individual plaintiff in the posture we're in  
13 at the moment. We can deal with that in due course.  
14 Obviously, if his deposition cannot be made available to the  
15 defendants, then he has to understand that's at his peril, if  
16 you will.

17 MR. ANDREWS: Absolutely, Your Honor.

18 THE COURT: Consequences to follow as necessary.

19 MR. ANDREWS: We always advise our plaintiffs of  
20 that.

21 THE COURT: Okay. So if you want to take those  
22 depositions, Mr. Meyer, take them by the end of the month.

23 MR. MEYER: Very good. Thank you, Your Honor.

24 THE COURT: Okay. Anything else, Mr. Andrews?

25 MR. ANDREWS: I don't have anything else, no.

1 THE COURT: Mr. Meyer, anything else?

2 MR. MEYER: Nothing further, Your Honor.

3 THE COURT: Okay, gentlemen, maybe I'll see you in  
4 November, maybe not.

5 MR. ANDREWS: Oh, Your Honor?

6 THE COURT: Yes, sir?

7 MR. ANDREWS: I'm sorry, I did want to apologize. I  
8 misunderstood. The order did say the conference was for 2:30.

9 THE COURT: It did.

10 MR. ANDREWS: So I came at around 2:45, so I  
11 apologize.

12 THE COURT: Noted.

13 MR. ANDREWS: Thank you.

14 THE COURT: Accepted.

15 MR. ANDREWS: Thank you.

16 THE COURT: All right. Have a good day everybody.

17 MR. MEYER: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from an  
2 electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Mary Greco

7 Dated: October 18, 2013  
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